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# SOME JUDICIAL MYTHS.

THE myths which are to be dealt with in this article do not come within the definition, "A tale handed down from primitive times, and in form historical, but in reality involving elements of early religious views." [1] Rather are they to be classed with what a learned writer[2] has styled Myths of Observation. These, Mr. Tyler assures us, "are inferences from observed facts, which take the form of positive assertions," "which seemed indeed probable when the myths arose, but which modern knowledge repudiates." At the root of these myths lies the easy transition from "it might have been" to "it was." In illustration of this myth-making tendency of the human mind, our author writes: "To men whose country has the open sea to its west it seems that the sun plunges at night into the waters. Now the sun is evidently a mass of matter at a distance, and very hot, and when red-hot bodies come in contact with water there follows a hissing noise: and thus the inference is easy and straightforward that when the sun dips into the waves such sound ought to be heard. From the inference that the hissing might be heard, is the easy step by which the crude argument of early science passes into the full grown Myth of Observation."

One of the judicial myths which would seem to fall within the class described above appears in a decision of the New York Court of Appeals. The case involved the construction of the Factors Act of New York. Said the court: [3] "Statutes similar to this have for

[1] The Century Dictionary.

[2] Tyler, Early History of Mankind, ch. XI.

[3] Soltau *v.* Gerdau, 119 N. Y. 380, 390, 23 N. E. 864 (1890).

many years existed in most if not all the states of the Union, and it has never yet been held, nor, so far as we can discover, claimed in any reported case, that the Factors Act can have any operation whatever in the case of goods taken by a common-law larceny from the true owner." Undoubtedly, the court gave the proper construction to the statute, but the positive assertion that statutes similar to the one under consideration had for many years existed in many if not all the states of the Union was a sheer myth. They existed in less than a half-score of the states. The learned judge who wrote the opinion of the court had observed the existence of the Factors Act in New York and a few neighboring states. To him the inference of its wide-spread existence seemed probable, and the transition was easy from "it might have been" to "it was."

Two examples of the myths under consideration may be found in a recent article from the pen of a learned judge.[1] The article contains an admirable discussion of certain provisions of the Bankruptcy Act of 1898 and of numerous decisions upon them. Even the myths which we are about to point out should not detract from the real merit of the article, but should be ascribed to what Mr. Tyler calls the myth-making tendency of the human mind.

The first myth is contained in the following extract: "It is often interesting to note the origin of phrases which are the small change of literature, and 'partnership entity' is now a legal commonplace. For it the profession seems to be indebted to Judge Thomas of the Eastern District of New York, and Mr. Lowell, whose work on bankruptcy was published in 1899."

No one will question that "partnership entity" is a commonplace phrase at the present time; and there may be many members of the bar who have no recollection of its use prior to 1899. To them the inference of the learned judge would seem warranted, that the legal profession is indebted for the phrase to a decision rendered in that year of grace. But a fuller knowledge of the history of the phrase repudiates the inference.

Six years before Judge Thomas' decision,[2] partnership had been defined, in a standard treatise on that subject, as "a legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between

[1] "Some New Aspects of Partnership Bankruptcy under the Act of 1898," 8 Colum. L. Rev. 599-604.

[2] Chemical Nat. Bank *v.* Meyer, 92 Fed. 896 (1899).

them."[1] The editor made no claim to originality in the use of the phrase under consideration. On the other hand, he cited abundant judicial authority for its employment. It may be of interest to quote from these sources, and others, to show that the phrase was well known, if not commonplace, when Judge Thomas repeated it in 1899.

The Supreme Court of Alabama had said: "A partnership, in contemplation of law, is an entity distinct from the members who compose it."[2] About the same time the Supreme Court of Mississippi declared: "In equity a partnership is for some purposes deemed a single entity."[3] Similar language has been used by the New York Court of Appeals repeatedly, of which the following is a fair sample: "In this action we are concerned only with the character which the law ascribes to partnership property while in the hands of the firm as a legal entity."[4] Chief Justice Bleckley, writing for the Supreme Court of Georgia, expressed its conception of a partnership in these words: "The law does take note on a wide scale, of partnership as a legal entity, and regards it as a unit both of rights and of obligations."[5] The Supreme Court of Nebraska announced many years ago that "A partnership is a distinct entity, having its own property, debts and credits. For the purpose for which it was created, it is a person, and as such is recognized by the law."[6] The doctrine has been reaffirmed in later cases.[7] It has found expression, too, in the decisions of the Michigan Supreme Court, as shown by the following extracts: "For many purposes a firm, though managed necessarily by its members, is a distinct concern and possesses a sort of individuality."[8] Again: "The partnership for most legal purposes is a distinct

[1] Parsons, Partnership, 4 ed., 1. The editor, Professor Beale, insists in his Preface that the mercantile conception of a partnership had then become the legal conception also; and declares "that great acknowledgment is due to Professor J. B. Ames, to whom more than anyone in this country we owe the acceptance of the doctrine."

[2] Teague *v.* Lindsey, 106 Ala. 266, 17 So. 538 (1895).

[3] Jackson Bank *v.* Durfey, 72 Miss. 971, 18 So. 456 (1895), adopting the language of Arnold *v.* Hagerman, 45 N. J. Eq. 186, 197 (1888).

[4] Greenwood *v.* Marvin, 111 N. Y. 423, 437, 19 N. E. 228 (1888). See Menagh *v.* Whitwell, 52 N. Y. 146 (1873); Bulger *v.* Rosa, 119 N. Y. 459, 465, 24 N. E. 853 (1890); Peyser *v.* Myers, 135 N. Y. 599, 604, 32 N. E. 699 (1892).

[5] Drucker *v.* Wellhouse, 82 Ga. 129, 132 (1888). In Ransom *v.* Wardlaw & Co., 99 Ga. 540, 27 S. E. 158 (1896), this court held that a firm may be insolvent, although the partners, as individuals, may be perfectly solvent.

[6] Roop *v.* Herron, 15 Neb. 73, 80 (1883).

[7] Richards *v.* Le Vielle, 44 Neb. 38, 62 N. W. 304 (1895).

[8] Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254, 260 (1877).

entity; — having its own property, capable of contracting its own debts, having the right to sue in equity its several members, and to be protected against their conduct to the extent that it might be against the conduct of strangers." [1] The Supreme Court of Vermont had no hesitation in declaring: "A partnership or joint stock company is just as distinct and palpable an entity in the idea of the law, as distinguished from the individuals composing it, as is a corporation." [2] As early as 1839 President Tucker said, on behalf of the Court of Appeals of Virginia, that a partnership is to be "considered as a separate and distinct person, invested with rights separate and distinct from each of the partners." [3] Some years earlier, Chief Justice Hornblower, with the approval of the Supreme Court of New Jersey, declared: "In the case of partnerships, the firm is the contracting party . . . the partnership the ideal person, formed by the union of interests, is the legal debtor. A partnership is considered in law as an artificial person or being, distinct from the individuals composing it. It is treated as such in law and in equity." [4] Earlier still, the Supreme Court of New York had laid it down as unquestioned, that the members of a firm "constitute but one person in law." [5]

The second myth in the article referred to is that "the Meyer case opened the discussion of a wholly novel question, namely, whether the Bankruptcy Act of 1898" "made out of an association of partners an entirely new, separate, and distinct 'person,' *i. e.*, the partnership entity." In support of this statement the learned judge refers to the absence of any reference to section five in the discussions of the present Bankruptcy Act, prior to its passage, and the lack of any "evidence that the framers of the Act attached any importance to the form of words they used."

It may be true that those members of the legal profession, who had never heard that a partnership had been treated by the law as an entity, attached no importance to the language, in sections one, three, and five, which clearly declared "partnerships" to be "persons," and gave unequivocal expression to the doctrine of partnership entity. However that may have been, the language was deemed very important by those who were familiar with the

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[1] Robertson *v.* Corsett, 39 Mich. 777, 784 (1878).
[2] Walker *v.* Wait, 50 Vt. 668, 676 (1878).
[3] Pierce's Adm'r *v.* Trigg's Heir, 10 Leigh (37 Va.) 406, 423 (1839).
[4] Curtis *v.* Hollingshead, 2 Green (14 N. J. L.) 402, 409 (1834).
[5] Warner *v.* Griswold, 8 Wend. (N. Y.) 665, 666 (1832).

doctrine. Long before the Meyer case came before Judge Thomas, the sections of the Bankruptcy Act, above mentioned, were the subject of frequent discussion by persons engaged in teaching the subject of partnership. So far as the present writer's memory serves him, the opinion of those persons was unanimous that those sections gave full effect to the partnership entity doctrine. His own view, which was committed to writing in the summer and fall of 1898, was stated as follows: "The doctrine (that a partnership is an entity distinct from the individuals composing it) has received legislative approval in the United States Bankruptcy Law of 1898. . . . In a jurisdiction where a partnership is treated as an entity, the firm may be proceeded against as an insolvent person, although one or more of its members may be able to pay his or their individual debts as well as the firm debts in full. . . . This statute declares that 'a partnership . . . may be adjudged a bankrupt'; that a person who suffers or permits, 'while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference,' commits an act of bankruptcy; that the word 'persons' shall include . . . 'partnerships'; that 'it shall be a complete defense to any proceedings in bankruptcy . . . to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of filing the petition against him, and if solvency at such date is proved, by the alleged bankrupt, the proceedings shall be dismissed'; and that a person is deemed insolvent 'whenever the aggregate of his property, exclusive of any property which may have been conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.'"[1]

A very interesting judicial myth in this country is connected with the English doctrine of out and out conversion into personalty of partnership real estate. It is especially noteworthy, not only because it has been repeated frequently by judges in widely separated jurisdictions, but because it illustrates the easy transition from "it might have been" of one court to "it was" of another.

The fullest statement of the myth is to be found in a North Carolina decision, and is as follows: "The idea that land shall

[1] Burdick, Partnership, 1 ed., 287, 291, quoting from §§ 1*a*, 15, 19, 3*a*, 5*a*, *h*, of the Bankruptcy Act of 1898.

be considered and treated as personal property is not readily comprehended by a plain mind, and requires explanation. It is an artificial and refined doctrine, adopted by the Chancellors in England in reference to copartnerships, on the principle of giving effect to the agreement of the copartners, and originated in this wise: By the common law, on feudal reasons, land could not be sold for the payment of debts. By virtue of legislative enactments, the writ of *elegit*, and statutes merchant and staple, subjected land to the claims of creditors in a modified way; that is, by giving the creditor the right to have the land extended at a yearly value, and to have an estate and to receive the rents and profits, until, at the extended value, the debt was satisfied. This, however, did not cause land to answer the purpose of trade and become the means of extended credit, as fully as if it could be sold out and out like personal property. Again, land held by joint tenancy was subject to the doctrine of survivorship, by which, on the death of either tenant, the whole estate belonged absolutely to the surviving tenant. This was a great drawback to the formation of copartnerships in which the business made it necessary for the firm to own land. To obviate these difficulties, the articles of copartnership in many instances contained the agreement that the land required and owned as part of the stock in trade should be considered as personality: and, in others, the acts of the parties furnished ground for the inference that it was the intention to impress on land the character of personalty in all such cases; and the Courts inclined to extend them by construction and implication." [1]

This statement has been accepted by the Kentucky Court of Appeals.[2] In other jurisdictions it has been supplemented to some extent by the affirmation that the tendency of the English courts to treat partnership real estate as converted out and out into personalty is due to their desire "to avoid the injustice of the English Canon of Descent of real estate to the eldest son." [3]

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[1] Summey *v.* Patton, Winst. Eq. 52 (60 N. C. 601), 86 Am. Dec. 451 (1864).

[2] Carter *v.* Flexner, 92 Ky. 400, 407 (1891).

[3] Craighead *v.* Pike, 58 N. J. Eq. 5, 43 At 424 (1899). The earliest suggestion of this branch of the myth which has fallen under the writer's notice is found in Markham *v.* Merrett, 7 How. (8 Miss.) 437, 445 (1843), in these words: "One reason which induced the [English] Courts to favor a change of the rule was, that it was unjust to prefer the rights of the heir at law, when the whole family may have been induced to look to it and to consider it as a common fund for the benefit of all, when the firm should be dissolved. This reason could have no weight here, the right of primogeniture being abolished." This case is the only authority cited in Parsons on Partnership in support

The myth, as thus supplemented, has been summarized as follows, in a decision of the New York Court of Appeals: "This doctrine [of out and out conversion] had its origin in England, and is said to have grown out of the peculiar law of inheritance there, and to remedy the hardship of the rule which excludes all but the eldest child from the inheritance; and of the other rule which exempts real estate in the hands of the heir from all but the specialty debts of the ancestor." [1]

Two cases are cited for this assertion, but in neither of them had the myth progressed beyond the stage of "it might have been." The language in the Massachusetts case is this: "The inheritance being exempt from liability for debts by simple contract, it is only by conversion and payment of the proceeds to the personal representative of a deceased partner, that his private creditors can receive payment out of such property. How far, if at all, this consideration may have been influential in determining the extent to which the doctrine of equitable conversion should be carried, and in establishing the right of the personal representative to require it to be made in his favor, we are unable to judge." [2] In the other case cited, the court said: "The English rule gives to the real estate of a partnership the character and qualities of personal property as to all persons; and the remainder, after paying debts and adjusting the equities of the partners, goes to the personal representatives, and not to the heir, probably on account of the great injustice which would result by the law of inheritance in England." [3] In support of this probability (and it will be observed that the myth has not yet developed into a positive assertion [4]), the court cites Collumb *v.* Read, [5] which contains no intimation of this doctrine, and Parsons on Partnership, [6] where the myth is set forth *in extenso.* It is quite remarkable that the learned author does not refer to a single English decision or writer in support of the reasons which he assigned for the English rule. [7]

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of that author's repetition of this reason for the English rule. See 4th ed., § 271, note (y).

[1] Darrow *v.* Calkins, 154 N. Y. 503, 513, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. 637 (1897).

[2] Shearer *v.* Shearer, 98 Mass. 107, 114 (1867).

[3] Fairchild *v.* Fairchild, 64 N. Y. 471, 478 (1876).

[4] See Aldrich *v.* Robinson, 2 Haw. 606, 608, 613 (1862), for a similar supposititious statement.

[5] 24 N. Y. 505 (1862).

[6] 3 ed., 370. The same paragraph appears in the fourth edition as § 271.

[7] The only authority cited is Markham *v.* Merrett, 7 How. (8 Miss.) 437, 445 (1843), referred to in a former note.

A very careful study by the present writer of every English case connected with this topic, as well as of English text books, has failed to disclose even a hint of either of the reasons assigned by this myth for the English rule. On the other hand, there seems no ground for doubt that, prior to 1791, the English bench and bar entertained the view "that lands purchased for the purpose of a partnership concern were in all respects a portion of the partnership fund, and were therefore distributable as personal property."[1] This view was based not on the difficulty of subjecting lands to the lien of an execution, nor on the injustice of primogeniture as a canon of descent, but on "the principle that all the property of a partnership, whether real or personal, is subject to a sale on dissolution of the partnership."[2] Such a sale is necessary to a partnership accounting and distribution of assets.[3]

The principle underlying the English rule of out and out conversion has been stated as follows by Lord Lindley: "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows, that, in equity, a share in a partnership, whether its property consists in land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the two parties."[4] It will be observed that there is no trace of the mythical reasons here.

Undoubtedly, Lord Thurlow laid down a different rule in Thornton *v.* Dixon,[5] although, when the case was first brought before him, he is reported to have said that where partners bought lands for the purpose of a partnership concern, it was to be considered as part of the partnership fund, and consequently to be considered as personal estate. Later, he held that, in order to convert such lands into personalty, there must be an agreement between the partners that they must be valued and sold, and that such agreement had not been made in the case before him. The neces-

[1] Watson, Partnership, 2 ed., 81 (1 Am. ed., 60); 1 Montague, Partnership, 2 ed., 139; Lord Eldon in Kirkpatrick *v.* Sime, 5 Paton Sc. App. 525, 535–6 (1811).

[2] Fereday *v.* Wightwick, 1 R. & M. 45, 49, Taml. 250, 33 R. R. 136 (1829).

[3] Darby *v.* Darby, 3 Drew. 495, 25 L. J. Ch. 371, 2 Jur. N. S. 271, 4 W. R. 413 (1856).

[4] Lindley, Partnership, 7 ed., 381.

[5] 3 Bro. Ch. 199 (1791).

sity for such special agreement was denied by Lord Eldon [1] as well as by other eminent judges; [2] and was repudiated by Parliament.[3]

Closely associated with the mythical reasons for the English rule, which we have been considering, is the equally mythical claim for the superiority of the American rule on this topic. In the learned opinion, already cited, that rule is stated as follows:

"In the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty with all the incidents of that species of property between the partners themselves, and also between the surviving partner and the real and personal representative of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner, that, so far as is necessary, it shall be first applied to the adjustment of partnership obligations and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary for these purposes, the character of the property is, in equity, deemed to be changed into personalty. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected." [4]

The rule thus set forth, we are assured in the same opinion, "commends itself for its simplicity": [5] and herein lies the myth. Place alongside the above statement the English rule as formulated in the Partnership Act of 1890:

"Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased

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[1] Selkrig *v.* Davies, 2 Dow. 230, 242 (1814); Crawshay *v.* Maule, 1 Sw. 495, 526, 1 Wils. Ch. 181, 18 R. R. 126 (1818); Townsend *v.* Devaynes, Montague, Partnership, Appendix, 96, 11 Sim. 498 note (1811).

[2] Phillips *v.* Phillips, 1 My. & K. 649, 1 L. J. Ch. N. S. 214, 36 R. R. 410 (1832); Broom *v.* Broom, 3 My. & K. 443 (1834); Darby *v.* Darby, 3 Drew. 495 (1856); Waterer *v.* Waterer, 15 Eq. 402, 21 W. R. 506 (1873); Holroyd *v.* Holroyd, 7 W. R. 426, 28 L. J. Ch. 902 (1859); Murtagh *v.* Costello, L. R. 7 Ir. 428 (1881).

[3] Partnership Act 1890 (53 & 54 Vict. c. 39), § 22.

[4] Darrow *v.* Calkins, 154 N. Y. 503, 514 (1897).

[5] *Ibid.*, 515.

partner and his executors or administrators, as personal or movable and not as heritable estate." [1]

Upon the face of those two rules, which one commends itself "for its simplicity"? Is it not the English rather than the American rule? If we go beyond the impressions produced by the mere statement, and examine the practical working of these rules, it becomes perfectly clear that the American rule results in all sorts of complications and confusion. Has the wife of a partner an inchoate dower interest in firm real estate? Can the surviving partner transfer either a legal or an equitable title to such real estate? Does he become a tenant in common with the heirs of the deceased partner? Is an action for partition maintainable between them? Is the real estate of a firm converted into personalty while it is in business? If it is, at what moment is it reconverted into realty? These are but a few of the many questions to which our "commendably simple" American rule has given rise, and to which our courts have given an astonishing variety of answers. If any one longs for a good example of the judicial confusion which this rule breeds, let him examine with some care a recent Arkansas decision.[2] It is submitted that no one can study the immense volume of litigation to which our doctrine of partial conversion has given rise without realizing that it is a perfect Pandora's box of invitations to lawsuits.

The myth of its "commendable simplicity" seems to be attributable to the prepossession of our judges in favor of a rule because it is *our* rule. It results from the same tendency of the human mind which led Lord Coke to indulge in the myth that English merchants had been models of thrift, fair dealing, and conscientious economy, until they fell from this Edenic estate through the temptations of wicked foreigners; [3] and which begot in Blackstone such an unquestioning faith in the perfection of the English common law as enabled him to dress up its most defective parts in a garb of charming fiction and throw over them a bewitching light.

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[1] § 22.

[2] French *v.* Vanatta, 83 Ark. 306, 104 S. W. 141 (1907), and comments thereon, 8 Colum. L. Rev. 208–211. *Cf.* Aldrich *v.* Robinson, 2 Haw. 606, 615 (1862).

[3] Co. Inst. 4, 277.